IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	§	
v.	§	
	§	**EP-18-CR-2330-PRM**
ANTONIO MANUEL VAZQUEZ-BAZA,	§	
Defendant.	§	

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

On this day, the Court considered Defendant Antonio Manuel Vazquez-Baza's [hereinafter "Defendant"] "Motion to Suppress" (ECF No. 80) [hereinafter "Motion"], filed on December 13, 2018; the Government's "Response to Defendant's Motion to Suppress" (ECF No. 84) [hereinafter "Response"], filed on December 19, 2018; Defendant's "Reply to Government's Response to Defendant's Motion to Suppress" (ECF No. 89) [hereinafter "Reply"], filed on December 27, 2018; and the arguments and testimony offered at the Suppression Hearing held on January 14, 2019 (ECF No. 100), in the above-captioned cause. Defendant argues that the Court should suppress and exclude evidence found on Defendant's cell phone because Defendant's consent to search the cell phone was involuntary. After due consideration, the Court is of the opinion that Defendant's Motion should be denied for the reasons that follow.

I. FINDINGS OF FACT

On January 14, 2019, Cristobal Gomez (Agent Gomez), a Supervisory Agent of the U.S. Border Patrol, and Jesus Garcia (Agent Garcia), a Special Agent of Homeland Security Investigations, testified and were cross-examined at a hearing regarding Defendant's Motion.

On July 10, 2018, in the early morning hours, Agent Gomez apprehended individuals who appeared to have illegally entered the United States. Agent Gomez found a cellular phone on one of the individuals, Elwin Calidonio-Cruz. The phone was ringing continuously, so Agent Gomez asked another agent to answer the phone and assume the identity of Mr. Calidonio-Cruz in order to make contact with the pickup driver. The agent communicated with a caller using a phone number with a 656 area code, which is the area code for Ciudad Juarez, Chihuahua, Mexico. The agent arranged a meeting with the caller at the intersection of Angus and Carablanca. Around 4:00 a.m., Defendant arrived at the location of Angus and Carablanca in a brown pickup truck.

Between approximately 4:00 a.m. and 4:05 a.m., the agents arrested Defendant. One of the apprehending agents asked Defendant why Defendant was at the location, and Defendant replied that he was there to

pick up "illegals." Defendant's cell phone was seized during his arrest. At the time of arrest, Defendant exhibited no visible signs of distress, such as shaking or sweating. Defendant was handcuffed and transported in the back of a caged government vehicle to the Ysleta Border Patrol Station.

At the station, Defendant's cuffs were removed. At approximately 4:25 a.m., Defendant was read his *Miranda* rights in the Spanish language and signed a statement on Form I-214 indicating that he understood his rights. *See* Gov't Ex. 1.

In addition, Defendant was read a waiver statement on Form I-214. During the hearing, Agent Gomez translated the statement, which was in Spanish on Form I-214, into English as follows:

> I am ready to give a declaration and answer questions. For the moment, I do not wish to have an attorney present. I understand and am conscious of what I am doing. I have not been promised or given any promises or coercion in any case.

After explaining to Defendant the waiver of rights statement, the agents marked an "X" on the signature line below the waiver statement to signify that Defendant may sign if he was willing to give a statement. Defendant elected not to sign the waiver of his rights. Significantly, Defendant did not verbally inform Agent Gomez that he wanted an

attorney. In addition, Defendant did not verbally inform Agent Gomez that he did not wish to speak to Agent Gomez. Agent Gomez interpreted Defendant's declining to sign the waiver as Defendant's conscious decision that he did not wish to talk with Agent Gomez or any other agent without an attorney. Accordingly, Agent Gomez stopped talking to Defendant.

For the next fifteen to twenty minutes after Defendant was read his *Miranda* rights, processing of Defendant continued and Defendant's biographical information and fingerprints were taken. During processing, Defendant was not handcuffed or shackled and was wearing the clothes that he wore at the time of arrest. Defendant exhibited no visible signs of distress.

Following processing, Defendant was placed into a holding cell. Defendant was alone in the cell and had access to bathroom facilities, water, and a plastic bed with a mattress pad. In addition, Defendant was offered food and water. Defendant was not handcuffed or shackled when he was inside the cell. The processing center had air conditioning and heat and was at a comfortable temperature. During the two to three times that Agent Gomez observed Defendant through the windows in the cell, Defendant displayed no visible signs of distress. Agent Gomez testified

that from the point of arrest until Agent Gomez went off duty, he did not yell at Defendant, threaten him in any way, manhandle him, hit him, or make him any promises.

Agent Garcia, a Special Agent of Homeland Security Investigations, was called to participate in the investigation around 6:00 a.m., and arrived at the Border Patrol station around 7:00 a.m. Agent Garcia observed Defendant in the holding cell and observed that Defendant exhibited no obvious signs of distress. After Agent Garcia's arrival, he contacted the agents who arrested Defendant to collect facts related to Defendant's arrest. Between approximately 7:00 a.m. and 9:20 a.m., Agent Garcia collected facts and photographed Mr. Calidonio-Cruz's phone as well as Defendant's phone. Defendant's phone had been seized by Border Patrol agents during Defendant's arrest. The phone was on a table in the Border Patrol station where Agent Garcia observed the phone "turn on" multiple times. At approximately 8:30 a.m., without unlocking the phone, Agent Garcia observed that Defendant's phone displayed five missed calls from the same phone number with a 656 area code that was initially found on Mr. Calidonio-Cruz's phone. *See* Gov't Exs. 2, 3(a).

At approximately 9:20 a.m., Agent Garcia approached Defendant. Agent Garcia was dressed in plain clothes and was not armed. Agent Garcia was accompanied by another agent. The other agent was dressed in plain clothes and was armed but not visibly so. Agent Garcia and the other agent brought Defendant from his cell to a table in the station processing area. Other Border Patrol agents and apprehended individuals were also present in the processing area. While escorting Defendant from his cell to the table in the station's processing area, Agent Garcia identified himself and asked Defendant if he was okay. Defendant replied that he was okay. Agent Garcia did not ask Defendant any questions about the case.

Once at the table in the processing center, Agent Garcia requested Defendant's consent to search his phone. Agent Garcia asked Defendant if he preferred English or Spanish, and Defendant replied that it did not matter. Then, Agent Garcia read Defendant the consent to search form (Consent Form) in English. *See* Gov't Ex. 4. Defendant was next to Agent Garcia as Agent Garcia read the form. The form stated, in relevant part, the following:

> I, [blank], hereby grant my consent to Agent(s) of the United States Border Patrol to search the mobile telephone(s) found

> on my person or in my vehicle including the address book, call history logs, photographs, videos, voice and text messages and other data contained in the telephone(s). To facilitate the search, I understand that the agents may digitally copy to and retain this data on a computer or other electronic device. I further give my consent for agents of the United States Border Patrol to answer the telephone if it rings.
>
> I understand that I have the right to refuse the consent to the search described above and to refuse to sign this form. I further state that no promises, threats, force, physical or mental coercion of any kind whatsoever have been used against me to get me to consent to the search of the mobile telephone(s).

Gov't Ex. 4. At approximately 9:26 a.m., Defendant signed the proffered Consent Form. Agent Garcia requested Defendant's PIN to unlock the phone and Defendant provided it.

After signing the document, Defendant volunteered to show Agent Garcia text messages or phone calls relating to his arrest. Agent Garcia told Defendant not to show them to him. Agent Garcia testified that he declined Defendant's offer because he had been informed and understood that Defendant had requested not to speak to agents without an attorney present. Following this conversation, Defendant asked if he could call his son's nurse. Defendant's son required medical attention and 24-hour nursing. Agent Garcia looked through Defendant's phone, retrieved the

nurse's phone number, and allowed Defendant to use Agent Garcia's phone to call the nurse. After that phone call, Agent Garcia asked Defendant questions about his son to make sure that his son was going to be okay and returned Defendant to the holding cell. Agent Garcia testified that he did not ask Defendant any questions about the case. Defendant was not handcuffed from the time Agent Garcia escorted Defendant out of the cell until Agent Garcia returned him to the cell. In addition, Agent Garcia made no promises to Defendant in exchange for Defendant's consent. Finally, Agent Garcia did not yell at Defendant, threaten him, or manhandle him.

II. LEGAL STANDARD

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The Supreme Court has determined that warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions. *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971)). In addition, "a warrant is generally required before [a

search of data on a cell phone], even when a cell phone is seized incident to arrest." *Riley v. California*, 134 S. Ct. 2473, 2493 (2014). "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *United States v. Scroggins*, 599 F.3d 433, 440 (5th Cir. 2010) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

"When courts review a search justified by consent, there are four distinct issues." *United States v. Freeman*, 482 F.3d 829, 831 (5th Cir. 2007). "First, as a threshold matter, the government must demonstrate that the defendant did consent," a determination that is "based on the totality of circumstances." *Id.* at 831–32 (citing *United States v. Price*, 54 F.3d 342, 345–46 (7th Cir. 1995)). Second, if the government is successful in demonstrating consent, the Government must next demonstrate that the defendant consented voluntarily. *Id.* at 832 (citing *Schneckloth*, 412 U.S. at 222). Third and fourth, the government must show that "the search was within the scope of consent" and that "the consenting individual had authority to consent."[1] *Id.* (first citing *United States v.*

[1] "Unlike the first two issues, scope and authority are not determined based on a totality-of-the-circumstances standard, but by a reasonable-officer standard." *Freeman*, 482 F.3d at 832.

Ibarra, 965 F.2d 1354, 1356 n.2 (5th Cir. 1992); then citing *United States v. Matlock*, 415 U.S. 164, 169–71 (1974); and then citing *Illinois v. Rodriguez*, 497 U.S. 177, 183–89 (1990)).

Defendant has not challenged the Government on the first, third, and fourth factors, nor would the record support such a challenge. Rather, Defendant's challenge focuses on the second factor, arguing that Defendant's consent was involuntary. Therefore, the Court will limit its analysis to the second factor.

"[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, (1973). Courts in the Fifth Circuit use a six-factor test to assess voluntariness, examining:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Freeman, 482 F.3d at 832–33 (citing *United States v. Kelley*, 981 F.2d

1464, 1470 (5th Cir. 1993)). "All six factors are relevant, but no single one is dispositive or controlling." *Id.* "The government has the burden of proving, by a preponderance of the evidence, that the consent was voluntary." *Kelley*, 981 F.2d at 1470 (citing *United States v. Yeagin*, 927 F.2d 798, 800 (5th Cir. 1991)).

III. ANALYSIS

In his Motion, Defendant "challenges the admission of any evidence obtained from [Defendant]'s cell phone on the grounds that his cell phone was subjected to an illegal search in violation of the Fourth Amendment." Mot. 3. Specifically, Defendant argues that Defendant's consent to the search of his cell phone was involuntary, and, therefore, the consent exception to the warrantless search of Defendant's phone does not apply. *Id.*

A. Factor 1: Voluntariness of Custodial Status

First, the Government concedes that Defendant was in custody at the time that he provided consent. Resp. 4. The record demonstrates that Defendant had been placed under arrest prior to providing consent and was detained at a Border Patrol station at the time he provided consent. Accordingly, the Court determines that Defendant's custodial status was

involuntary and this factor weighs in favor of Defendant.

B. Factor 2: Presence of Coercion

The second factor is "the presence of coercive police procedures." *United States v. Freeman*, 482 F.3d at 832. For the reasons that follow, the Court determines that no coercive police procedures were present because the agents did not threaten Defendant, did not command Defendant to consent to the search, did not make any promises, and did not use prolonged detention following Defendant's decision not to sign a *Miranda* waiver in order to coerce Defendant.

1. Absence of Threats or Intimidation

"[T]he mere presence of armed officers does not render a situation coercive." *United States v. Martinez*, 410 F. App'x 759, 764 (5th Cir. 2011). In determining whether coercive procedures were used, courts have considered whether the law enforcement officials present at the scene drew their weapons or raised their voices. *See United States v. Mata*, 517 F.3d 279, 283 (5th Cir. 2008) (noting lack of coercion where officers did not have their weapons drawn and did not yell at or threaten the defendant); *Martinez*, 410 F. App'x at 764 ("The officers were not pointing their firearms at anyone and were not threatening [the defendant] or

shouting."). Here, there is no evidence that the agents raised their voices or threatened Defendant. Indeed, Agent Garcia's communications with Defendant prior to requesting Defendant's consent were cordial: Agent Garcia identified himself and asked Defendant if he was "okay," to which Defendant replied in the affirmative. Therefore, the Court determines that the agents did not threaten or otherwise exhibit intimidating behavior toward Defendant to obtain his consent.

2. Absence of Commands

In addition, coercive procedures may be found if an officer's conduct can be described as a command or direction rather than a request for consent. *United States v. Zavala*, 459 F. App'x 429, 433 (5th Cir. 2012) (holding there were coercive procedures when defendant followed officer to a checkpoint where defendant's vehicle was subject to a canine sniff after officer stated, "I'm going to go ahead and take you to the checkpoint, sir," which the court determined could "more accurately be described as directions to follow rather than request for consent to follow"); *United States v. Drayton*, 536 U.S. 194, 206 (2002) (finding consent to search was voluntary when "[n]othing [the officer] said indicated a command to consent to the search."). Here, there is no evidence that any agent

directed or commanded Defendant to sign the Consent Form. Rather, Agent Garcia testified that he requested Defendant's consent and read the Consent Form to Defendant. The Consent Form stated that Defendant had the right to refuse consent. Accordingly, Agent Garcia's interaction with Defendant cannot be characterized as a command to consent to search.

3. Absence of Promises

At the hearing, Defendant's counsel argued that the agents took advantage of Defendant's need to call his son's nurse to secure Defendant's consent to search the phone. However, the testimony at the hearing demonstrates that the agents did not specifically condition Defendant's ability to call the nurse on his consent. Rather, Agent Garcia testified that he did not know that Defendant needed the nurse's phone number until after Defendant signed the Consent Form. Accordingly, the record supports that Defendant consented to search prior to asking for the nurse's phone number. Therefore, the Court determines that the agents did not condition Defendant's ability to call his son's nurse on his consent or otherwise take advantage of Defendant's desire to call his son's nurse. Finally, both Agent Gomez and Agent Garcia testified that they did not

make any promises to Defendant.

4. Approach by Agents Following Refusal to Sign Waiver of *Miranda* Rights and Detention

In addition, Defendant argues that Defendant was subject to coercive police procedures because the agents approached Defendant for his consent to search his phone after Defendant had invoked his rights under *Miranda*. Mot. 4. *Miranda v. Arizona* established that "an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). Pursuant to the *Edwards* rule, an accused who has expressed "his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." *Id.* at 484–85. The *Edwards* rule is a prophylactic rule designed to prevent police from "badgering a defendant into waiving his previously asserted *Miranda* rights." *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)).

The Fifth Circuit has "suggested that a request for consent [to

search] is not an 'interrogation' capable of violating the *Edwards* rule." *United States v. Gonzalez-Garcia*, 708 F.3d 682, 686–87 (5th Cir. 2013). "A statement granting 'consent to a search . . . is neither testimonial nor communicative in the Fifth Amendment sense.'" *United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) (quoting WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, Criminal Procedure § 3.10 (4th ed. 2004)). Furthermore, when evidence seized is "physical, nontestimonial evidence, an *Edwards* violation itself would not justify suppression." *Gonzalez-Garcia*, 708 F.3d at 687.

Here, Defendant "does not argue that the unwarned consent to search his phone constitutes an *Edwards* violation." Reply 2. Rather, Defendant argues that "the circumstances surrounding the Government's efforts to obtain this consent are evidence of coercive police procedures when viewed in the totality of the circumstances." Reply 2–3. Specifically, Defendant argues, the agents' attempt to re-approach Defendant while in prolonged police custody after he had invoked his *Miranda* rights was a coercive technique. *Id.*

Defendant cites *Maryland v. Schatzer*, which Defendant argues "makes clear that efforts by officers to re-approach defendants in

prolonged police custody carries 'a significantly greater risk of coercion.'" Reply 3 (quoting *Schatzer*, 559 U.S. at 105). However, in *Maryland v. Schatzer*, the Supreme Court was considering when the risk of coercion justifies the prophylactic *Edwards* rule in the context of the Fifth Amendment, not whether coercion has rendered a consent to search involuntary under the Fourth Amendment. Defendant cites no case holding that the risk of coercion contemplated in Fifth Amendment jurisprudence applies to the voluntariness of consent under the Fourth Amendment. Nonetheless, the Court will consider whether the agents' contact with Defendant subsequent to Defendant's alleged invocation of his *Miranda* rights and detention amounted to a coercive procedure under the totality of the circumstances. As explained below, the Court determines that, first, Defendant did not invoke his *Miranda* right to counsel and, second, Defendant's detention did not amount to a coercive procedure.

First, there is little evidence supporting Defendant's claim that Defendant invoked his right to counsel. "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an

attorney.'" *Davis v. United States*, 512 U.S. 452, 459 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)). An ambiguous or equivocal reference to an attorney does not require interrogation to end if "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel." *Id.* (citing *McNeil*, 501 U.S. at 178). Accordingly, "the suspect must unambiguously request counsel" and "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* The Fifth Circuit has "frequently noted that an affirmative refusal to sign the waiver, while relevant, is not in itself conclusive of whether the accused has invoked *Miranda* rights." *United States v. Esquivel-Pizano*, 990 F.2d 625 n.7 (5th Cir. 1993) (citing *United States v. McKinney*, 758 F.2d 1036 (5th Cir. 1985)).

Here, Defendant argues that Defendant invoked his right to counsel when he declined to sign the waiver of his *Miranda* rights. Mot. 5. Specifically, Defendant declined to sign a waiver which stated, as translated by Agent Gomez from Spanish to English, the following:

> I am ready to give a declaration and answer questions. For the moment, I do not wish to have an attorney present. I

> understand and am conscious of what I am doing. I have not been promised or given any promises or coercion in any case.

See Gov't Ex. 1. However, there is no evidence that Defendant made a verbal statement expressing a desire for or requesting counsel. Agent Gomez testified that Defendant did not tell Agent Gomez that he "wanted" an attorney. Here, a reasonable officer would have understood only that Defendant *might* be invoking his right to counsel.[2] Defendant's declining to sign the waiver alone is not an unambiguous request for counsel and does not amount to invocation of his *Miranda* right to counsel. *See Davis*, 512 U.S. at 459; *McKinney*, 758 F.2d at 1045 ("[W]e reject [the defendant's] claim that his refusal to sign a waiver form automatically rendered further questioning illegal."). Because Defendant did not expressly request an attorney, the agent's subsequent request for consent to search Defendant's phone does not amount to the type of badgering that might coerce a suspect into consent.

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[2] Though Agent Gomez and Agent Garcia testified that they believed that Defendant did not wish to speak to agents without an attorney, their beliefs are not determinative of whether Defendant invoked his *Miranda* right to counsel. Rather, the question of whether a suspect has invoked his right to counsel is an objective inquiry that examines whether a reasonable officer would construe the suspect's statement to be a request for an attorney. *See Davis*, 512 U.S. at 458–59 ("To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry.").

Finally, the circumstances of Defendant's detention do not suggest that it was coercive. "[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." *United States v. Watson*, 423 U.S. 411, 424 (1976). In *United States v. Ramirez*, the defendant had been detained for four hours between his arrest and his signing the consent to search form and had not used the restroom or had anything to eat or drink. 963 F.2d 693, 704 (5th Cir. 1992). In spite of the defendant's detention, the Fifth Circuit affirmed the district court's finding of voluntary consent because the defendant had signed the consent form free of restraints, had been read his *Miranda* rights, and was "very cooperative." *Id.* However, a suspect's detention can contribute to a finding of involuntariness if "police custody had a severe impact on the defendant's self-control." *United States v. Politano*, 491 F. Supp. 456, 465 (W.D.N.Y. 1980) (holding consent to search was not voluntary when the defendant was handcuffed for two hours, was evidently "very scared" as exemplified by her urinating in her pants, and police used other coercive tactics).

Here, Defendant was arrested around 4:00 a.m. and signed the Consent Form at 9:26 a.m. Accordingly, approximately five and a half

hours passed between when Defendant was arrested and when he signed the Consent Form. For approximately five of those hours, Defendant was detained in a holding cell. During that time, Defendant was offered food and water, had access to a bathroom and bed, and was not handcuffed. Neither Agent Gomez nor Agent Garcia observed Defendant display obvious signs of physical distress. Further, Defendant replied that he was "okay" when Agent Garcia inquired. Accordingly, the record establishes that Defendant's detention did not severely impact his self-control.

Additionally, it does not appear that the agents attempted to use Defendant's time in detention to compel him to consent to the search. Rather, prior to approaching Defendant for consent to search Defendant's phone, Agent Garcia was collecting facts and investigating the case between approximately 7:00 a.m. and 9:20 a.m. Furthermore, Agent Gomez and Agent Garcia both testified that, following Defendant's refusal to sign the waiver of his *Miranda* rights, they did not ask Defendant any questions regarding the case. Accordingly, there was no badgering or re-interrogation that might have coerced Defendant into signing the Consent Form.

In sum, the agents' approaching Defendant with a request for

Defendant's consent to search his phone following Defendant's prior refusal to sign a waiver of his *Miranda* rights and detention does not on its own constitute a coercive procedure. In addition, any other coercive procedures—such as a threat, a command to consent, or a promise—are absent from the record. Accordingly, the Court determines that the agents used no coercive procedures and this factor weighs in favor of a finding of voluntariness.

C. Factor 3: Extent of Defendant's Cooperation with the Police

The third factor used to determine the voluntariness of consent is "the extent and level of the defendant's cooperation with the police." *Freeman*, 482 F.3d at 832. Relevant to this inquiry is whether the defendant's consent to the search is "consistent with the rest of [the defendant's] behavior that night." *Martinez*, 410 F. App'x at 764.

Here, several actions by Defendant suggest that he was cooperating with law enforcement. At the time of Defendant's arrest, an agent asked Defendant why Defendant was at that location and Defendant replied that he was there in order to pick up "illegals." Defendant not only signed the consent to search form but provided his passcode to Agent Garcia in order

to unlock Defendant's phone. Furthermore, after Defendant signed the Consent Form, Defendant attempted to show Agent Garcia incriminating evidence on the phone. *See United States v. Solis*, 299 F.3d 420, 437 (5th Cir. 2002) (holding that consent was voluntary when witness pointed out incriminating evidence).

However, not all of Defendant's conduct was completely cooperative: after being advised of his *Miranda* rights, Defendant elected not to sign a waiver of his *Miranda* rights and was silent until he was approached by Agent Garcia. Nonetheless, Defendant's decision not to sign the waiver and his subsequent silence were not especially uncooperative. The conduct could not be characterized as "hostile" or an attempt to frustrate the agents' investigation in a considerable manner. *See United States v. Hernandez*, 279 F.3d 302, 308 (5th Cir. 2002) (finding that the defendant's cooperation was "substantial" when she agreed to get off bus with an officer, identify her suit case, and give permission to search it and there was nothing in record indicating that she displayed hostile actions or attempted to frustrate investigation in considerable manner, despite the fact that she did not give officer combination to suitcase and lied about the suitcase's contents).

Accordingly, despite Defendant's decision not to waive his *Miranda* rights and his subsequent silence, Defendant was generally cooperative with the agents. Therefore, the Court is of the opinion that this factor weighs in favor of a finding that consent was voluntary.

D. Factor 4: Defendant's Awareness of Right to Refuse to Consent

The fourth factor is "the defendant's awareness of his right to refuse to consent." *Freeman*, 482 F.3d at 832. This factor weighs in favor of the Government when law enforcement produces a search form, honestly explains the form's contents in a way that clearly implies that the defendant could refuse to consent, and obtains a signature on the form. *United States v. Ordonez*, 244 F. Supp. 2d 770, 777 (S.D. Tex. 2003).

Here, Agent Garcia testified that he took Defendant out of his cell and brought him to a table in the Border Patrol station. There, Agent Garcia asked Defendant if he preferred Spanish or English, to which Defendant replied that it did not matter. Then, Agent Garcia read Defendant the Consent Form in English, and Defendant then signed the form. Relevant here, the form stated:

> I understand that I have the right to refuse the consent to the search described above and to refuse to sign this form. I further state that no promises, threats, force, physical or

> mental coercion of any kind whatsoever have been used against me to get me to consent to the search of the mobile telephone(s).

Gov't Ex. 4. Accordingly, because Agent Garcia read the Consent Form, the form stated that Defendant had a right to refuse consent, Defendant possessed a high-school level education, and Defendant signed the form, the Court determines that Defendant likely understood that he had the right to refuse the consent. Accordingly, the Court is of the opinion that this factor weighs in favor of a finding that Defendant's consent was voluntary.

E. Factor 5: Defendant's Education and Intelligence

The fifth factor is "the defendant's education and intelligence." *Freeman*, 482 F.3d at 832. Here, Defendant concedes that Defendant speaks English and has a high-school level education. Mot. 7. Therefore, the Court is of the opinion that this factor weighs in favor of finding that the consent was voluntary. *See United States v. Benavides*, No. SA-09-CR-903, 2010 WL 5373884, at *4 (W.D. Tex. Dec. 21, 2010) (holding that consent to search was voluntary when, among other factors, the defendant had a high school diploma).

F. Factor 6: Defendant's Belief that No Incriminating Evidence Will be Found

The sixth factor is "the defendant's belief that no incriminating evidence will be found." *Freeman*, 482 F.3d at 832. Consent is more likely to be voluntary when the defendant did *not* know incriminating evidence would be found and, conversely, involuntary when the defendant knew incriminating evidence would be found. *See United States v. Ponce*, 8 F.3d 989, 998 (5th Cir. 1993) (holding consent to search was voluntary when the defendant stated, "Dang, I forgot it was there," upon the officer's discovery of heroin in the defendant's watch pocket); *United States v. Sanchez-Mendoza*, No. MO-09-CR-003, 2009 WL 10680137, at *5 (W.D. Tex. Apr. 29, 2009) (holding that the defendant's statement that she was unaware cocaine had been placed in her vehicle "suggests that consent was voluntary because she would not have known that incriminating evidence would be discovered"). This factor is given less weight when a defendant knew incriminating evidence would be discovered but had already admitted to the crime and was not seeking to conceal the incriminating evidence. *Martinez*, 410 F. App'x at 764–65 ("[I]t would be significantly more likely for a defendant to consent voluntarily to a search

that he knew would produce evidence of a crime if he had already voluntarily admitted to committing the crime.").

In this case, at the hearing, both the Government and Defendant agreed that Defendant likely knew that there was incriminating evidence on his phone. However, the Government argues that Defendant had "already made self-incriminating statements to law enforcement at the time he was arrested and resigned to incriminating evidence being found on his phone." Resp. 7. At the hearing, Agent Gomez testified that, when asked why Defendant was at the location where the agents were waiting, Defendant responded that he was there "to pick up illegals." The Court concludes that Defendant made an incriminating statement to the agents prior to consenting to the search of his phone. Therefore, Defendant was more likely to have voluntarily consented to a search of his phone despite knowing it contained incriminating evidence. Accordingly, though this factor weighs in favor of a finding of involuntariness, it is accorded less weight because of Defendant's prior incriminating statement.

IV. CONCLUSION

In sum, considering the totality of the circumstances, the Court is of the opinion that the Government met its burden of establishing that

Defendant voluntarily consented to the search of his phone. Though Defendant's involuntary custodial status weighs in favor of a finding of involuntariness, the other factors demonstrate that Defendant's consent was nonetheless voluntary. The Government established that the agents did not employ any coercive procedures; that Defendant was, on the whole, cooperative with law enforcement; and that Defendant was aware of his right to refuse consent. The parties concede that Defendant had a high school diploma and could speak English. Finally, given Defendant's prior incriminating statement, Defendant's knowledge of the likelihood of incriminating evidence on his phone under factor six is given less weight. Therefore, the Court finds that Defendant voluntarily consented to the search of his cell phone, and, therefore, denies Defendant's request to suppress the contents of his cell phone as the fruit of an unlawful search.

Accordingly, **IT IS ORDERED** that Antonio Manuel Vazquez-Baza's "Motion to Suppress" (ECF No. 80) is **DENIED**.

SIGNED this **28th day** of **January, 2019**.

PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE